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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 2 Miscellaneous

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,

Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE

Of Counsel:
SHIPLEY AKERMAN PICKETT
STEIN & KAPS
National Press Building
Washington, D.C. 20004

CARL L. SHIPLEY
Amicus Curiae

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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On June 16, 1969 this Court entered an order granting the motion of Carl L. Shipley for leave to file a brief as *amicus curiae*, and set oral argument on October 20, 1969 on a motion for leave to file the petition for writ of prohibition and/or mandamus. Said order indicated that additional briefs might be filed by the parties, with the petitioner's brief due within 60 days and that of the respondent within 30 days thereafter. The brief of petitioner was filed on September 5, 1969, and a "Statement and

Report of the Judicial Council of the Tenth Circuit" on or about the same date, a copy of which was forwarded to petitioner under date of September 5, 1969, who in turn supplied a copy to this *amicus curiae*. In view of the shortness of time, it is respectfully requested that the Court permit the *amicus curiae* pursuant to Rule 42 to file this said brief, whether or not consent of the parties is obtained. The *amicus curiae* has requested the consent of the parties but does not wish to delay filing said brief. It is believed that the filing of an *amicus curiae* brief in support of the petitioner herein will not prejudice any party and may contribute to the cause of justice in representing the interest of the public, members of the Federal judiciary, members of the Bar, and others similarly situated, who might be affected by the Court's decision in the pending matter.

BACKGROUND

On January 1, 1966, in No. 1111 Miscellaneous, October Term, 1965, in this Court, petitioner filed a "Petition for Writ of Prohibition and/or Mandamus" requesting this Court to restrain the respondent Judicial Council of the Tenth Circuit of the United States from exceeding its jurisdictional power in issuing an order stripping the petitioner of his power and authority to try or otherwise take action in cases and proceedings filed or instituted in the United States District Court for the Western District of Oklahoma, and asking this Court to direct the vacation of said order.

Petitioner stated in his petition that jurisdiction of this Court was invoked under 28 U.S.C. 1651. With the above petition, petitioner filed a "Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus, and Petition and Writ of Prohibition and/or Mandamus".

In his statement of the case giving rise to the above pleadings, petitioner stated that on December 13, 1965, the Judicial Council of the Tenth Circuit met in special session in Denver, Colorado, without notice to him or opportunity for hearing, and adopted an order finding that petitioner

Judge Chandler was presently unable or unwilling to discharge the duties of his office and ordered in pertinent part:

> "That until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other Judges of said Court; and that until the further order of the Judicial Council, no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever".

As reasons for granting the requested writ of prohibition, petitioner has set forth that he had no relief available in any other Court in the land, that Title 28 U.S.C. 1251-1294 does not specifically confer on this Court or any Court of Appeals of the United States, jurisdiction to hear an appeal from a judicial council, and that the only relief available to Judge Chandler must come through an extraordinary writ as provided in 28 U.S.C. 1651(a), or through the inherent powers of this Court. Also, it was pointed out that since the Judicial Council of the Tenth Circuit has as its members the same circuit judges as would hear an appeal to the United States Court of Appeals for the Tenth Circuit, any hope of relief through that route would be futile. Petitioner has stated that while there may have been questions whether the extraordinary relief he prayed for could issue under the old "all-writs" statute (28 U.S.C. 377, 36 Stat. 1162), that the Act of June 25, 1948, 62 Stat. 944, broadened the jurisdiction of the Court under 28 U.S.C. 1651(a) not only to issue all writs necessary to its jurisdiction, but also all writs appropriate in aid of its jurisdiction.

Petitioner Chandler further asserted that the writ prayed for should be issued because it affords the only expeditious and effective means of confining the Judicial Council of the Tenth Circuit to a lawful exercise of its functions as pre-

scribed by 28 U.S.C. 332, the statute under which said Council asserted jurisdiction to issue its December 13, 1965 order; that the writ should issue because "a question of immense public importance is involved and it is peculiarly appropriate that action by this Court should be taken"; and that the writ prayed for should issue in order to preserve Judge Chandler's "constitutional rights of due process of law as set forth in Amendment V to the Constitution of the United States", and denied him in the proceeding of the Judicial Council of the Tenth Circuit.

On January 21, 1966 in No. 1111 Miscellaneous, *Chandler v. Judicial Council of the Tenth Circuit of the United States*, this Court in reliance upon a response of the Solicitor General to petitioner's application for a stay of the order of the Judicial Council which indicated that the order from which relief was sought was interlocutory in that prompt further proceedings at which Judge Chandler would be permitted to appear with counsel would be undertaken, denied the stay pending "contemplated prompt action of the Judicial Council".

The central issue in the present proceedings was touched upon in the dissent to the January 21, 1966 action of this Court of Mr. Justice Black, with whom Mr. Justice Douglas joined, to the effect that insofar as the Council invoked 28 U.S.C. 332 as the source of its jurisdictional authority:

> "There is no language whatever in this or any other Act which can by any reasonable interpretation be read as giving the Council a power to pass upon the work of District Judges, declare them inefficient and strip them of their power to act as Judges. The language of Congress indicates a purpose to vest the Judicial Council with limited *administrative* powers; nothing in this language or the history behind it indicates that a Council or Circuit Court Judge was to be vested with power to discipline District Judges and in effect remove them from office. This is clearly and simply a proceeding by Circuit Judges to inquire into the fitness of a District Judge to hold his office and to remove him

if they so desire. I do not believe Congress could, even if it wished, vest any such power in the Circuit Judges.

"One of the great advances made in the structure of government by our Constitution was its provision for an independent judiciary—for judges who could do their duty as they saw it without having to account to superior court judges or to anyone else except the Senate sitting as a court of impeachment. Art. II, paragraph 4 of the Constitution provides that 'Officers of the United States' which include judges, 'shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors', and Art. I paragraphs 2 and 3, state that impeachment can be instituted only on recommendation of the House of Representatives and that trial can be held only by the Senate. To hold that judges can do what this Judicial Council has tried to do to Judge Chandler here would in my judgment violate the plan of our Constitution to preserve, as far as possible, the liberty of the people by guaranteeing that they have judges wholly independent of the Government or any of its agents with the exception of the United States Congress acting under its limited power of impeachment."

On September 18, 1967 the respondent sent the Clerk of this Court a copy of the minutes of the Judicial Council of the Tenth Circuit dated September 14, 1967 including a letter dated September 1, 1967 signed by all of the judges of the United States District Court of the Western District of Oklahoma advising that "the current order for the division of business of this district is agreeable under the circumstances" and that the Council "by reason of that acceptance by all the United States District Judges of the Western District of Oklahoma no action of the Council is either necessary or appropriate at this time".

Earlier in No. 1111 Miscellaneous, the Solicitor General on February 9, 1966 had filed a "Memorandum for

Respondent" indicating that since Judge Chandler had joined in the correspondence respecting the division of cases in his Court the petition in this case had become moot.

It is significant that neither the above response of the Solicitor General nor the action of the Council in forwarding to the Clerk of this Court the minutes of its meeting, directed attention to a letter of January 25, 1966 to the Judicial Council in response to the Council's order filed with the Clerk of the United States District Court, Northern, Eastern, and Western Districts of Oklahoma, and signed by Judges Luther Bohanon, Fred Daugherty and Luther B. Eubank or the attached order of the United States District Court for the Western District of Oklahoma, made pursuant to the order of the Judicial Council of the Tenth Circuit in special session on December 13, 1965, and filed with the Clerk of the above Court on December 28, 1965, dividing the cases among Judges Bohanon, Daugherty and Eubank, with assistance by Judge Rizley, and providing in its last paragraph in pertinent part as follows:

> "The execution of this order by Judge Chandler is done by him under protest and without prejudice to or waiver of any and all of his rights to have said order of the Judicial Council reviewed and vacated, stayed, or otherwise attacked. Dated this 25 day of January, 1966".
>
> /s/ Luther Bohanon
> Judge of the Northern, Eastern and Western District
>
> /s/ Fred Daugherty
> Judge of the Northern, Eastern and Western District
>
> /s/ Ross Rizley
> Judge
>
> /s/ Luther G. Eubank
> Judge"

ARGUMENT

Carl L. Shipley as *amicus curiae* adopts and incorporates by reference as a part of his argument the portions of petitioner's pleadings referred to hereinabove and the additional statement of background facts set forth as a preliminary statement of the case.

A threshold question grows out of this Court's June 16, 1969 order setting this case for oral argument on the Motion for Leave to File the Petition for Writ of Prohibition and/or Mandamus, i.e., the question of jurisdiction. The Supreme Court of the United States is vested with two types of jurisdiction under Art. III of the Constitution, i.e., original jurisdiction and appellate jurisdiction. The former is limited to "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party"; the latter relates to all other types of cases, "both as to law and fact, with such exceptions, and under such regulations as the Congress shall make". Congress has taken no action respecting appeals from orders of the judicial councils established by 28 U.S.C. 332. The legislative history and purpose of this section have been referred to by Mr. Justice Black as outlined herein above, and have been extensively discussed by judges, scholars and other witnesses in hearings on "Judicial Fitness" before the Subcommittee on Improvements on Judicial Machinery of the Committee on the Judiciary, United States Senate, 89th Cong. 2nd Ses., February 15, May 9 and June 17 and 20 and July 15, 1966; in hearings on "The Judicial Reform Act" before the same Committee of Congress, 90th Cong., 2nd Ses., on S. 3055, S. 3060, S. 3061, and S. 3062, on April 23, 24, May 1, 15, June 6, July 25, 1966, and in additional hearings before the same Committee of Congress on "Federal Judges and Courts" 91st Cong., 1st Ses., on S. 952, S. 567, S. 474, S. 585, S. 852, S. 898, S. 1036, S. 1216, S. 1509, S. 1646, S. 1712, and S. 2040 on April 15, 16 and May 6 and 7, 1969.

While there is some indication in the legislative history of the statute establishing the judicial councils (28 U.S.C.

332) that their determinations were to be "final", (See Hearings on Administration of United States Courts, H.R. 2973, House Judiciary Committee, 76th Cong., 1st Ses., page 13 (1939)), there is nothing in any judicial decision or in any testimony since that time respecting appellate jurisdiction or procedures for review of orders of judicial councils, or supporting that view.

The basic statutory provisions dealing with the appellate jurisdiction of this Court are contained in 28 U.S.C. 1252-1258, which provide for direct appeals to this Court from decisions invalidating Acts of Congress, from decisions of three-judge courts, from decisions of Courts of Appeals, from decisions of the Court of Claims, from the Court of Customs and Patent Appeals, and from the highest Court of a State. No light is shed upon the orders of judicial councils. In situations where Congress intended decisions of federal judicial bodies to be final, it has plainly said so, e.g., 28 U.S.C. 1447(d), 41 U.S.C. 321, 322. It cannot be presumed that Judge Chandler or any other party affected adversely in his rights, constitutional, statutory, or otherwise, by an order of a judicial council, was intended by Congress not to have a right of review of such order. Indeed, any such proposition would verge on the monstrous, since Art. III of the Constitution clearly contemplates appellate jurisdiction in this Court in all cases whatsoever. It would appear to be almost elementary that the finality of an order of a judicial council could not be assumed on the basis of the legislative history of a bill in one branch of Congress. That being so, then appellate jurisdiction respecting the specific order of the Judicial Council of the Tenth Circuit herein involved must lie somewhere where Congress has exercised its responsibility under Art. III of the Constitution respecting the appellate jurisdiction of this Court. In 28 U.S.C. 1252-1258, Congress provided for direct or other appeal from judicial bodies. The Council is not a judicial court and apparently did not purport to exercise judicial power. Art. III of the Constitution vests all judicial power "in one Supreme Court, and

in such inferior courts as the Congress may from time to time ordain and establish." 28 U.S.C. 332 does not establish judicial councils as either judicial or legislative courts. The action of the Judicial Council of the Tenth Circuit herein was in the form of an order signed by five judges in their individual capacities as Circuit Judges. Thus, it is clear the Council was not acting as an administrative agency, and in any event, in those cases where review of administrative agency decisions has been vested in judicial courts, e.g., the Federal Communications Commission (47 U.S.C. 402), Congress has so provided in positive terms. So it would appear that this Court must have jurisdiction of the pending petition for Writ of Prohibition and/or Mandamus under the so-called "all writs" section of 28 U.S.C. 1651, which provides in pertinent part as follows:

> "The Supreme Court and all Courts established by Act of Congress may issue *all writs necessary or appropriate in aid of* their respective jurisdictions and agreeable to the usages and principles of law." (Emph. supp.)

Even were it assumed that the order of judicial councils were in and of themselves final or not otherwise subject to review, the action of the Council in interfering with the disposition of pending cases before Judge Chandler, all of which were and are within the appellate jurisdiction of this Court, would seem to give this Court jurisdiction under the the "all writs" section to issue "all writs necessary or appropriate in aid of" its appellate jurisdiction over such cases and in aid of its jurisdiction over the actions of the Circuit Judges who signed the order in their capacities as individual Circuit Judges. And, in any event, this Court has all inherent power necessary to supervise all federal courts and agencies, all federal officers appointed and acting pursuant to the Constitution and all federal judges in whatever capacity exercising Art. III authority in constitutional courts and Art. I authority in legislative courts or similar bodies. Unless "due process" includes such inherent authority, it is meaningless. Apart from the question of

jurisdiction, this *amicus curiae* urges this Court to issue the writ petitioned for by Judge Chandler for the reasons referred to hereinabove. It is respectfully submitted that this Court not only should, but has a Constitutional obligation to, exercise its jurisdiction both inherent and under 28 U.S.C. 1651 over Judge Chandler's petition for a writ herein.

In addition to the information developed in the hearings cited above, of which this Court should take judicial notice, the Court's attention is invited to a confidential House Committee Print entitled "Report of Investigation of Judicial Behavior in the Tenth Circuit United States Court of Appeals by the Committee on the Judiciary, House of Representatives" 90th Cong., 2nd Ses., April 30, 1968 which was included as defendant's Exhibit D-16 in an opposition to a motion for summary judgment in *Chandler v. O'Bryan*, case No. 68-26 Civil, filed in September, 1969, U.S. District Court for the Western District of Oklahoma, and now apparently a part of the public record, wherein there is criticism of the situation in the Western District of Oklahoma but where it is concluded, after a thorough analysis of all of the charges and countercharges which gave rise to the action of the Judicial Council herein, that:

1. "Judge Chandler is a man of established reputation, position, integrity and worth in the community".
2. ". . .investigation has disclosed no evidence available at this time which would support a charge of impeachment against any of the judges investigated. If any of the judges should be removed because they are unfit to discharge their responsibilities the only mechanism provided by the Constitution, impeachment, is not available".
3. "The Action of the Tenth Circuit Judicial Council of December 13, 1965 to strip Judge Chandler of his power to hear cases was equivalent to his removal as a judge. It was an action completely beyond the legal authority of the

Council. Such action is forbidden by the Constitution. Congress has never authorized circuit judges to inquire into the fitness of a district judge to hold his office and to remove him if they so determined".

4. "Until the Constitution is amended or until Congress has enacted corrective legislation, no attempt should be made to solve judicial fitness problems through the administrative powers granted in 28 U.S.C. 332."

This same committee print includes a scholarly analysis of the fate of previous attempts to reconcile an independent judiciary with a mechanism to resolve questions of judicial behavior and fitness to hold judicial office other than by the impeachment process. In the words of the report:

> "Consideration of the problem of removal of Federal judges because they are unfit to perform their responsibilities involves serious constitutional questions. Is the impeachment process exclusive, or is it only a limitation on the powers of Congress to preserve an independent judiciary? Can the judiciary be given powers to discipline its own members in the absence of an amendment to the Constitution?"

The report discusses the official position of the American Bar Association in 1937 that a constitutional amendment would not be necessary and the subsequent fate of proposed legislation (H.R. 9160, 76th Cong. 3rd Ses., 1940) along these lines, as well as the defeat of a similar bill (H.R. 5939, 76th Cong.) where Congressman Emanuel Celler, now Chairman of the House Judiciary Committee, contended that "good behavior is not a justiciable question" and that the proposed procedure was unconstitutional. Mr. Celler stated that "Congress cannot pass bills of attainder by calling them bills of decapitation and exile". This latest report, although not as yet adopted by the House Judiciary Committee, concludes with the important observation that:

> "The issue of whether an amendment to the Constitution is needed for the removal of Federal

> judges remains surrounded by controversy. Certainly all controversy can be avoided, and the independence of the judiciary safeguarded, if any new procedure for the removal of Federal judges would be authorized by appropriate amendment to the Constitution."

It is respectfully submitted that this Court should take judicial notice of the above quoted committee print in view of the fact that it has become an official part of the pleadings in a case involving matters which, in part, gave rise to the order of the Judicial Council of the Tenth Circuit which Judge Chandler requests this Court to prohibit by appropriate writ as a flagrant and unjustified usurpation of power in violation of both 28 U.S.C. 332 and the due process provisions of the Constitution. Whether or not the committee print is ever formally adopted as a report of the House Judiciary Committee, its conclusions are worthy of consideration by this Court.

WHEREFORE, the premises considered, it is respectfully submitted that this Court has both inherent jurisdiction under the Federal Constitution and statutory jurisdiction under 28 U.S.C. 1651 to entertain Judge Chandler's petition for a writ, and it should exercise its jurisdiction and issue the requested writ forthwith.

Respectfully submitted,

CARL L. SHIPLEY
Amicus Curiae

Of Counsel:

SHIPLEY AKERMAN PICKETT
STEIN & KAPS
National Press Building
Washington, D. C. 20004